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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

**Re: Reply Comments for ACSI; CC Docket No. 96-98**

Dear Mr. Caton:

Enclosed for filing with the Federal Communications Commission please find an original and 18 copies of the Reply Comments of American Communications Services, Inc. in the above-referenced matter.

Please acknowledge receipt of this filing by date-stamping the duplicate provided and returning it to the bearer. Thank you for your assistance.

Sincerely,



Brad E. Mutschelknaus

Enclosures

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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**MAY 30 1996**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Implementation of the Local ) CC Docket No. 96-98  
Competition Provisions in the )  
Telecommunications Act of 1996 )

**REPLY COMMENTS OF  
AMERICAN COMMUNICATIONS SERVICES, INC.**

Respectfully submitted,

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May 30, 1996

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions in the	)	
Telecommunications Act of 1996	)	

**REPLY COMMENTS OF  
AMERICAN COMMUNICATIONS SERVICES, INC.**

American Communications Services, Inc. (ACSI), by its attorneys, hereby replies to comments filed by other parties concerning "first round"<sup>1</sup> issues in response to the Commission's Notice of Proposed Rulemaking (NPRM or Notice) in the above-captioned proceeding.<sup>2</sup> ACSI filed initial comments in this proceeding on May 16, 1996 and May 20, 1996, and hereby reiterates each position therein. In addition, ACSI is an active member of the Association for Local Telecommunications Services (ALTS), and strongly supports the views expressed by ALTS in its initial comments.

**Summary**

The FCC stated it best in its *Notice*: "Congress entrusted to [the FCC] the responsibility for establishing rules that will implement most quickly and effectively the

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<sup>1</sup> The Commission separated the issues covered by the *Notice* into two groups and established separate comment dates for each. ACSI hereby replies to comments which were due on May 16, 1996.

<sup>2</sup> FCC 96-182 (released April 19, 1996).

national telecommunications policy embodied" in the Telecommunications Act of 1996 (1996 Act).<sup>3</sup> The policy which Congress wants implemented is unambiguous, *i.e.*, "to accelerate rapidly private sector deployment of advanced telecommunications. . . technologies and services to all Americans by opening all telecommunications markets to competition. . ."<sup>4</sup> After receiving literally hundreds of submissions containing many thousands of pages of relevant information, the Commission should be primed to act swiftly to implement rules consistent with this mandate.

Not surprisingly, the initial comments filed herein reveal two widely divergent views of how the Commission should proceed. On the one side, numerous desirous interconnectors such as ACSI urged the Commission to create an open network of unbundled elements, with interconnection at all possible points at cost-based rates. On the other hand, the old guard -- led by the incumbent local exchange companies (ILECs) -- have asked the Commission to keep interconnection and unbundling to a minimum. Worse yet, they want to price it in ways which would inevitably stifle (if not suffocate) the emergence of robust, facilities-based local competition.

ILEC desires to hold on to their monopoly pasts are understandable. But Congress has instructed the FCC to leap headlong in another direction by embracing a competitive model for local services. As is explained herein, that effort will require the Commission to ignore ILEC pleas to leave implementation to the 1996 Act to the vagaries of private negotiation and state commission arbitration. It will require the Commission to reject

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<sup>3</sup> Notice ¶ 2.

<sup>4</sup> H. R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 1-2 (1996), (Conference Report).

recycled ILEC rationales for refusing interconnection at all possible points (including subloop unbundling) and for treating interconnectors as less than co-carrier LECs. Perhaps most daunting, it will require the Commission to overcome the ILEC claims of doom, and force them to establish prices for services and facilities offered to competitors at the economic cost of providing them.

Using the draft regulations filed by ALTS as a baseline, ACSI respectfully urges the Commission to adopt comprehensive and explicit national rules implementing the 1996 Act which are consistent with these principles.

**I. THE FCC CAN AND SHOULD ASSUME A CENTRAL ROLE IN IMPLEMENTING THE INTERCONNECTION PROVISIONS OF THE 1996 ACT. [SECTION II.A, ¶¶ 25-41]**

The primary goal of the 1996 Act is to increase competition in telecommunications *nationwide*. Although attaining this goal will require the combined effort of the Commission and the states, ACSI agrees<sup>5</sup> with the United States Department of Justice (DOJ), AT&T, ALTS, Sprint, MCI, CompTel, and others<sup>6</sup> that the Commission must take the initiative and establish uniform national rules that will guide the efforts of the state commissions in implementing local competition. As DOJ states succinctly, the 1996 Act "evinces a clear

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<sup>5</sup> Hereafter, all citations to comments filed by other parties refer to their initial comments filed in this docket on May 16, 1996, and are cited by indicating the name of the commenter and identifying the relevant page references.

<sup>6</sup> DOJ, pp. 5-10; AT&T Corp. (AT&T), pp. 3-11; ALTS, pp. 2-3; Sprint Corporation (Sprint), pp. 3-8; MCI Telecommunications Corporation (MCI), pp. 3-5; Competitive Telecommunications Association (CompTel), pp. 13-22.

intent to establish a *national* policy to promote competition in local telephone services,"<sup>7</sup> and it "contemplates. . . *national* rules governing incumbent obligations. . ."<sup>8</sup>

ACSI recognizes that many states already have made significant headway in making local competition a reality, and does not believe that the Commission should hinder future state measures to make local competition viable. However, as several commenters have noted, without a uniform national policy, telecommunications carriers will be forced to deal with a patchwork of differing and unpredictable state regulatory interpretations of the 1996 Act, some of which promote local competition and some of which do not.<sup>9</sup>

ACSI strongly disagrees with contentions made by some ILECs that a strong federal role will unduly interfere with and hamper state commission efforts to craft their own local competition policies.<sup>10</sup> The states can only play the critical part that they have been assigned under sections 251 and 252 of the 1996 Act if the Commission meets its obligations under the 1996 Act and establishes a clear and uniform framework of efficient principles on which the states can base their individual decisions.<sup>11</sup> Nonetheless, ACSI agrees with AT&T that the national rules adopted by the Commission must be sufficiently flexible to account for relevant differences while assuring "that the minimum terms and conditions, and the rates and rate structures, for interconnection arrangements will be substantially the same

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<sup>7</sup> DOJ, p. 8 (emphasis in original).

<sup>8</sup> DOJ, p. 5 (emphasis in original).

<sup>9</sup> See ALTS, p. 3; AT&T, pp. 8-9.

<sup>10</sup> See GTE Service Corporation (GTE), pp. 2-7.

<sup>11</sup> AT&T, p. 46.

in any two exchange areas with the same demographic and geographic features, irrespective of the particular state in which the exchanges are located."<sup>12</sup>

ACSI also takes issue with ILEC claims that, "for the most part national standards are contrary to the intent of the Act due to their inherent inflexibility which will hinder, if not prevent, carrier negotiations."<sup>13</sup> Carrier negotiations will not be thwarted by inflexible national rules, but they would be thwarted by piecemeal and redundant litigation that drains the resources of new entrants and delays deployment of their networks. If anything, rules that apply nationally will simplify carriers' business plans, reduce capital costs, improve competitors' access to the capital markets, limit the areas of potential disagreement and deter wasteful and unnecessary litigation.

ACSI submits that explicit national rules will resolve the considerable uncertainty which exists today and serve to "jump-start" local competition nationwide. Importantly, they will set the stage for implementation of local interconnection through carrier negotiations and state arbitrations. As AT&T commented, "adoption of explicit national rules that establish the essential minimum conditions for the national provision of competitive exchange services is merely *one* necessary condition to the implementation of the 1996 Act's objectives."<sup>14</sup> States still must play important roles in implementing the national policies established by Congress and FCC -- an effort that ACSI will support actively.

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<sup>12</sup> AT&T, pp. 12-13.

<sup>13</sup> SBC, p. 6.

<sup>14</sup> AT&T, p. 13.



**II. ILECs MUST PERMIT INTERCONNECTION EVERYWHERE THAT IT IS TECHNICALLY FEASIBLE, NOT ONLY POINTS WHICH ARE CONVENIENT FOR THEM. [SECTION II.B.2, §§ 56-59, 66-73, and 86-91]**

The 1996 Act is unequivocal that ILECs have a statutory duty to provide interconnection "at any technically feasible point" in their networks.<sup>15</sup> Likewise, ILECs have a duty to provide access to unbundled network elements "at any technically feasible point."<sup>16</sup> This language should leave little room for confusion. Webster's dictionary defines "feasible" as "1. Capable of being accomplished or brought about: POSSIBLE. . ."<sup>17</sup> Thus, Congress intended that ILECs permit interconnection at any point where it is technically *possible* for competitors to hook up.

Despite this seemingly clear edict, many ILECs seek to evade meaningful interconnection through adoption of federal guidelines which water down the statutory requirement that it be provided at "any technically feasible point." Led by USTA, a number of ILECs, for example, argued that interconnection must be limited to points where an interface can be "disclosed, ordered, provisioned, maintained and billed for without unique or special handling"; it can be offered without "undermining network reliability, increasing the risk of physical damage, service impairment, service degradation or creating a hazard"; and meets the "service and security needs of . . . the incumbent LEC network."<sup>18</sup> Such ill-defined standards -- enforced by the ILECs themselves -- present unlimited potential for

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<sup>15</sup> 47 U.S.C. § 251(c)(2)(A).

<sup>16</sup> 47 U.S.C. § 251(c)(3).

<sup>17</sup> *Webster's II New Riverside University Dictionary*, p. 468 (1984) (first of three possible definitions listed).

<sup>18</sup> United States Telephone Association (USTA), pp. 12-13.

anticompetitive mischief. If adopted, such standards could justify any refusal to interconnect on the basis of the ILECs' own billing convenience, self-imagined security needs, alleged service impairment difficulties, etc.

Indeed, this ILEC wish list is merely an attempt to resurrect tariff restrictions rejected by the FCC nearly 30 years ago. Using strikingly similar arguments, the ILECs then resisted competitive entry in the equipment market by refusing interconnection of devices which threatened the integrity of their networks.<sup>19</sup> The Commission set aside this veiled attempt to preserve the ILEC monopoly. As the FCC later explained, "the only question . . . is whether such interconnection would be harmful" to the network, and ILECs bear the burden of demonstrating such harm.<sup>20</sup> Any other requirement, such as those advocated by USTA,<sup>21</sup> can -- and as history shows, will -- be used by incumbent monopolies as pretexts to refuse interconnection to competitors.

The FCC also should be skeptical of ILEC pleas to leave interconnection matters exclusively to the realm of private negotiations.<sup>22</sup> If private negotiations were adequate, there would have been no need for creation of a statutory duty. Because ILECs have

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<sup>19</sup> See *Hush-A-Phone v. U.S.*, 20 F.C.C. 391, 413 (1955); *Jordaphone*, 18 F.C.C. 644, 647 (1954). *Use of Carterphone Device in MTS*, 13 F.C.C. 2d 420, *recon. denied*, 14 F.C.C. 2d 571 (1968).

<sup>20</sup> AT&T's Proposed Tariff Revisions in Tariff F.C.C. No. 263 Exempting Mebane Home Telephone Co. from the Obligation to Afford Customers the Option of Interconnecting Customer-Provided Equipment to Mebane's Facilities, 53 F.C.C. 2d 473, 477 (1975).

<sup>21</sup> USTA's general position draws support from BellSouth Corporation (BellSouth), p. 17; SBC Communications, Inc. (SBC), pp. 27-28; and Pacific Telesis Group (PacTel), pp. 23-24.

<sup>22</sup> E.g., Ameritech, pp. 5-9; SBC, pp. 5-7; BellSouth, pp. 5-7.

markedly superior bargaining power in interconnection negotiations, the truth is that government intervention is required to compel meaningful ILEC interconnection.

Similarly, ILEC claims that existing federal rules governing special access collocation are adequate for local interconnection are misguided.<sup>23</sup> ACSI generally agrees with AT&T that collocation is but one permissible means of interconnection, and that the existing rules for collocation must be updated to be consistent with the requirements of the 1996 Act.<sup>24</sup> Thus, rules ought to make clear that physical collocation must now be offered at all buildings owned or leased by ILECs and other structures housing ILEC facilities on public rights-of-way. They also should prohibit any restriction on the types of telecommunications equipment that carriers may collocate, safeguard against ILEC claims that space limitations or technical issues justify a denial of physical collocation, and require that ILECs plan for the likely space demands of other carriers when they remodel or acquire new facilities. The rules should also give CLECs the option of choosing virtual collocation as an alternative to physical collocation.<sup>25</sup>

Finally, the claim by some ILECs that collocation requirements constitute an unconstitutional "taking"<sup>26</sup> may be the most pernicious attempt to evade the 1996 Act's interconnection requirements. Having lobbied relentlessly for enactment of the 1996 Act, it seems somehow unseemly for the same ILECs to now be arguing that a critical portion of the

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<sup>23</sup> *E.g.*, Ameritech, pp. 22-24; Bell Atlantic, pp. 32-34; SBC, pp. 61-63.

<sup>24</sup> AT&T, pp. 39-42.

<sup>25</sup> *Id.*; *See Notice* ¶¶ 71-72.

<sup>26</sup> US West, Inc. (US West), pp. 29-32 (contends that both "physical" and "virtual" collocation requirements constitute impermissible "takings").

Act is unconstitutional. In any event, the constitutionality argument must be seen for what it is, *i.e.*, a "red herring." It is elementary that an unconstitutional "taking" can occur only where just compensation is not paid for the property right surrendered.<sup>27</sup> In this instance, Congress expressly conditioned interconnectors' use of their right of interconnection upon the payment of a "just and reasonable rate" which is "based on the cost" of providing interconnection.<sup>28</sup> Thus, compensation is guaranteed and there is no serious constitutional issue.

In short, federal rules are required to ensure that ILECs offer interconnection which is consistent with the pro-competitive purposes of the 1996 Act. The ILECs initial comments in this proceeding betray their predilection to resist interconnection in the absence of explicit requirements. ACSI supports the position taken by several commenters that ILECs bear the burden of demonstrating that the requested interconnection is not technically feasible,<sup>29</sup> that interconnection be required at any point where there is historical precedent for it,<sup>30</sup> and interconnection be required wherever it is envisioned by published industry interconnection standards.<sup>31</sup> ACSI particularly commends consideration of Subpart D.002 of the detailed regulations proposed by ALTS. The ALTS rules reflect a careful balancing of the interest in

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<sup>27</sup> U.S. Constitution, Amends. 5, 14. *In Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S.C. 419 (1982), a government-mandated "physical intrusion" was a taking where the New York PSC permitted only a confiscatory one-time charge of \$1. By contrast, the 1996 Act guarantees ILECs full recover of their incremental costs.

<sup>28</sup> 47 U.S.C. § 252(d)(1).

<sup>29</sup> *E.g.* AT&T, p. 31; CompTel, pp. 41-42; Sprint, p. 14; *See Notice* ¶ 58.

<sup>30</sup> *E.g.* AT&T, pp. 32-33; CompTel, p. 41; MCI, pp. 10-11.

<sup>31</sup> AT&T, p. 33.

flexibility against the need for specific requirements. Any ILEC truly interested in complying with the 1996 Act's interconnection requirements should have no major objection to them.

### **III. MANDATORY INTERIM BILL AND KEEP TRAFFIC EXCHANGE ARRANGEMENTS ARE CONSISTENT WITH THE PRO-COMPETITIVE PURPOSES OF THE 1996 ACT. [SECTION II.C.5, ¶¶ 239-243]**

The use of a system of "bill and keep" for an interim period received broad support from desirous interconnectors.<sup>32</sup> It is evident that measurement systems are inadequate in many areas to support a system of reciprocal compensation payments.<sup>33</sup> Further, the economic justification for investment in such measurement systems is highly questionable where roughly equal volumes of local traffic are exchanged between co-carriers.<sup>34</sup> Thus, a system of bill and keep simply makes sense as a way to initiate local traffic exchange quickly. It can be replaced if actual market experience shows material traffic imbalances between co-carriers.

However, the broad support given "bill and keep" by CLECs and IXC's was countered by the opposition to the system expressed by most ILECs.<sup>35</sup> Few, if any, ILECs bothered to attack the use of bill and keep on its merits. Certainly none attempted to challenge the administrative simplicity or efficiency offered by the bill and keep system. Instead, most

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<sup>32</sup> *E.g.*, MCI, pp. 51-52; Sprint, pp. 85-88; AT&T, p. 69; ALTS, pp. 42-46; *See* DOJ, pp. 30-32.

<sup>33</sup> ALTS, p. 44.

<sup>34</sup> *See* ALTS, p. 45.

<sup>35</sup> *E.g.*, BellSouth, pp. 73-75; Bell Atlantic, pp. 41-42; US West, pp. 70-71.

ILECs chose to attack the legality of mandating a bill and keep system on both statutory and constitutional grounds.

The ILECs statutory argument is hard to fathom. The 1996 Act states expressly that it "shall not be construed. . .to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal compensation, including arrangements that waive mutual recovery (*such as bill and keep arrangements*). . ."<sup>36</sup> In addition, the legislative history observes that "mutual and reciprocal recovery of costs. . . may include a range of compensation schemes, such as an in-kind exchange of traffic without cash payment (known as *bill and keep arrangements*)."<sup>37</sup> Congress clearly believed that bill and keep might be advisable for at least an interim period.

The ILECs constitutional argument is similarly perplexing. Essentially their position is that a bill and keep system constitutes an unconstitutional "taking" since no cash is exchanged in remuneration for services rendered.<sup>38</sup> But this simplistic argument ignores the economic reality that in-kind payments (via mutual traffic termination) represent very real compensation. Moreover, there is no reason to believe that the in-kind payment is inadequate to constitute just and reasonable compensation unless the volume of traffic exchanged is materially out-of-balance.<sup>39</sup>

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<sup>36</sup> 47 U.S.C. § 252(d)(2)(B)(i) (emphasis added).

<sup>37</sup> Joint Explanatory Statement of the Committee of Conference, p. 7 (emphasis added).

<sup>38</sup> *E.g.*, BellSouth, pp. 74-75; Bell Atlantic, pp. 41-42; US West, p. 70.

<sup>39</sup> ACSI does not oppose a requirement that bill and keep be replaced if exchanged traffic volumes between specific co-carriers prove to be imbalanced over a significant period of time.

The truth appears to be that most ILECs oppose bill and keep because it interferes with their plans to charge CLECs more for traffic termination than they are willing pay CLECs for terminating their traffic. In ACSI's initial comments, we explained how several ILECs are demanding that ACSI pay them special "universal service" or "transitional rate" charges per MOU of traffic exchanged.<sup>40</sup> Similarly, Nynex continues to support use of a one-sided "pay or play" scheme<sup>41</sup> and virtually all ILECs are requiring payment of a non-cost based "transiting charge" to connect to independent ILECs or other CLECs.<sup>42</sup> These are one-way charges which allow ILECs to profit from traffic exchange arrangements with competitors.

Indeed, if bill and keep arrangements are so distasteful, it is curious how it became the dominant system for the exchange of traffic between ILECs for the mutual termination of EAS traffic. The fact is that bill and keep has been employed by ILECs between each other routinely for many years,<sup>43</sup> because it offers the twin benefits of simplicity and administrative efficiency. The FCC should not permit ILECs to sacrifice these benefits solely to enrich themselves at the expense of competitors which have no choice but to interconnect with them. Consequently, ACSI urges the Commission to adopt the interim

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<sup>40</sup> ACSI Comments, pp. 27-28.

<sup>41</sup> Nynex Telephone Companies (Nynex), pp. 91-97.

<sup>42</sup> ACSI, p. 27. Notably, ACSI does not oppose the application of "transiting" charges which are set at TSLRIC.

<sup>43</sup> See DOJ, p. 32.

system of bill and keep described at Subpart C.103(a) of the draft interconnection regulations submitted by ALTS.<sup>44</sup>

#### **IV. SUBLOOP UNBUNDLING IS A PREDICATE TO MEANINGFUL FACILITIES-BASED LOCAL COMPETITION. [SECTION II.B.2, ¶¶ 94-97]**

While support from the commenters for unbundling the local loop is virtually unanimous, there is sharp disagreement between the ILECs and potential interconnectors regarding the advisability of subloop unbundling. Most CLECs and IXC's strongly support the inclusion of subloop unbundling on a Commission-prescribed list of minimum unbundled network elements.<sup>45</sup> Although the terminology and specifics may vary somewhat, virtually all such supporters of subloop unbundling urge the FCC to require that local loops be offered as a whole *and*, where applicable, broken down into the following piece-parts: feeder, SLC and distribution.<sup>46</sup> These commenters agree that individual components of the local loop constitute discrete network elements, and that interconnectors often can operate most efficiently by purchasing only the subloop elements which they need to round out their own networks.

Not surprisingly, most ILECs disagree.<sup>47</sup> They support an "all or nothing" proposition, where interconnectors must purchase an entire loop whether they need it or not. Interestingly, most ILECs seem to agree with US West's admission that subloop unbundling

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<sup>44</sup> ALTS, Attachment A.

<sup>45</sup> *E.g.*, MCI, p. 29; AT&T, p. 19; DOJ, p. 19; ALTS, pp. 26-28.

<sup>46</sup> AT&T, p. 19.

<sup>47</sup> *E.g.*, USTA pp. 28-31; SBC pp. 38-40; BellSouth, pp. 37-39.



is "'technically possible' at almost every point," but not "feasible."<sup>48</sup> Although ILEC resistance to subloop unbundling has several formulations, most are traceable to the several objections voiced by USTA.

First, ILECs are troubled by the fact that there is "no standard configuration of subloop elements,"<sup>49</sup> and, thus, there is not a readily defined set of interface locations which would apply in each instance.<sup>50</sup> Many loops, for example, employ multiplexing or a concentration point to separate feeder from distribution in the transmission path, while others do not.<sup>51</sup> This "one size fits all" predicate for qualification as an element must be rejected outright as antithetical to the purposes of the 1996 Act. The 1996 Act requires interconnection at every feasible point, not every point which is consistently replicated throughout the network. Indeed, if complete uniformity is required, unbundled elements will be few, since minor variations both within and between ILECs occur in virtually all functions. Indeed, by USTA's own admission, just as there is "no standard configuration of subloop elements," so too there "is no one standard configuration of a local loop."<sup>52</sup> Certainly this lack of uniformity among local loops could not be used to refuse local loop unbundling completely, nor should it be used as an excuse to avoid subloop unbundling. As

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<sup>48</sup> US West, p. 49.

<sup>49</sup> USTA, p. 30; *See* US West, pp. 49-54.

<sup>50</sup> USTA, fn. 35.

<sup>51</sup> *Id.*

<sup>52</sup> USTA, p. 30.

DOJ recognizes,<sup>53</sup> the 1996 Act requires that the network, including the loop, be unbundled wherever it can be.

Second, the ILECs complain that they have not yet developed, tested or implemented subloop unbundling anywhere.<sup>54</sup> They allege that upfront development and implementation costs to add hardware, modify databases, train manpower, etc., would be "enormous."<sup>55</sup> Simply put, this same argument could have been made against any loop unbundling only two years ago. The same systems development had to occur after New York and other states ordered loop unbundling for the first time, and the ILECs -- despite earlier protestations -- were able to comply quickly. Subloop unbundling may not be "convenient" for them, but the statutory standard is whether it is "feasible."

Third, the ILECs complain that space is scarce, and existing rights-of-way and real estate may not support multiple providers at probable subloop interface points.<sup>56</sup> Similarly, they argue that third-party access to ILEC facilities (such as manholes and CEVs) raise safety, security and access issues. These complaints are identical to those raised previously by the ILECs in opposition to plans requiring them to permit physical collocation by special access interconnectors.<sup>57</sup> Both the FCC, and now Congress, rejected these arguments in the

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<sup>53</sup> DOJ, p. 19.

<sup>54</sup> USTA, p. 31.

<sup>55</sup> USTA, p. 31; *See* US West, pp. 49-54.

<sup>56</sup> *Id.*

<sup>57</sup> *See Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369 (1992).

past, as they should be rejected again here. Experience has demonstrated that these concerns can and have been worked out successfully between co-carrier interconnectors.

Finally, the ILECs most serious objection to subloop unbundling is that the outside plant architecture allegedly has not been designed or constructed for interconnection or use in a multi-LEC environment.<sup>58</sup> The most common contention is that the SAIs, SLCs and similar equipment have not been designed to support interconnection of multiple LECs.<sup>59</sup> ACSI is sympathetic to these concerns. There are important differences in loop configurations, and not all network equipment can be readily adapted to a multi-LEC environment.

However, the fact that interconnection may prove difficult at selected points in a subset of the total universe of local loops should not be used as an excuse to refuse interconnection in the many situations where it can be accommodated. As AT&T explained in its comments, "[E]ach of the subloop elements uses a different type of facility or equipment or performs a different function and thus is logically separable from the others, and each is interconnected to the others using standard industry technical specifications and systems. Thus, there is no question that such unbundling is technically feasible where ALECs employ equipment that adheres to such standards and interface through the ILEC through compatible systems."<sup>60</sup> As ACSI demonstrated in its initial comments,<sup>61</sup> and in a

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<sup>58</sup> USTA, p. 31; *See* US West, pp. 52-53.

<sup>59</sup> *Id.*

<sup>60</sup> AT&T, p. 19.

<sup>61</sup> ACSI, pp. 35-40.

supporting declaration supplied by its engineering expert,<sup>62</sup> many existing loop configurations can readily support CLEC interconnection to subloop elements today, and unbundling at such points is required by the 1996 Act.

Importantly, this is not an academic question. As the declaration attached to our initial comments makes evident,<sup>63</sup> ACSI's current business plan anticipates the extensive use of subloop elements obtained from ILECs.<sup>64</sup> ACSI intends to install its own switches and construct fiber rings to replace ILEC feeder plant.<sup>65</sup> However, on many occasions ACSI will still need to purchase loop concentration and multiplexing functionality, as well as loop distribution plant, from the ILECs to connect to actual customer premises. If subloop elements are unattainable, ACSI will be forced to purchase a combined local loop, including portions (such as feeder plant) which it does not need and cannot use. This creates an obvious disincentive for ACSI to invest in and deploy comprehensive local fiber rings.

Interestingly, this is an outcome which plainly favors the ILECs, which would retain their bottleneck control over loop facilities indefinitely. But it is just as plainly inconsistent with the express purposes of the 1996 Act, which was intended to "accelerate rapidly private sector deployment of advanced telecommunications. . . technologies. . ."<sup>66</sup> Consequently,

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<sup>62</sup> ACSI, Attachment 2 (Declaration of Warren Liss) (Liss Declaration).

<sup>63</sup> Liss Declaration, ¶¶ 3-7.

<sup>64</sup> Indeed, ACSI has already made formal request (unsuccessfully to date) to five major ILECs for subloop unbundling. Liss Declaration, ¶ 4.

<sup>65</sup> Liss Declaration, ¶ 3.

<sup>66</sup> Conference Report, p. 2.

the Commission should not deviate from the intentions expressed in its *Notice*, and should expressly require ILEC unbundling of subloop elements wherever technically possible.<sup>67</sup>

**V. RULES MUST REQUIRE THAT ILEC PRICES FOR INTERCONNECTION AND UNBUNDLING BE SET AT TSLRIC. [SECTION II.B.2, ¶¶ 121-154]**

In ACSI's view, the single most disturbing theme in the initial comments was the persistent ILEC demand that the FCC disqualify itself from involvement in pricing matters. The ILEC arguments represent a transparent attempt to assign all pricing questions to fora where they are likely to have a distinct advantage over interconnectors, *i.e.*, private negotiations and state commission arbitrations, and avoid the cost-based pricing which is an essential precondition to meaningful local competition.

The ILECs make two basic arguments (both meritless) in opposition to FCC rules applicable to the pricing of interconnection and unbundled network elements. First, they contend that Congress intended that pricing issues be left to private negotiations between ILECs and interconnectors.<sup>68</sup> The simple response is that Congress did not leave pricing decisions to the exclusive province of private negotiations. Even if parties reach agreement, the rates agreed upon must be "nondiscriminatory."<sup>69</sup> Where parties are unable to agree, as will commonly be true, state commissions must establish rates through arbitration which are "based on the cost" of the interconnection or network element "determined without reference

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<sup>67</sup> *Notice* ¶¶ 94, 97.

<sup>68</sup> *E.g.*, BellSouth, p. 49; Nynex, p. 40; USTA, p. 37.

<sup>69</sup> 47 U.S.C. § 252(e).

to a rate-of-return or other rate-based proceeding."<sup>70</sup> Thus, the 1996 Act establishes specific statutory standards governing the pricing included in interconnection agreements, and it is incumbent upon the FCC to further define and illuminate those statutory requirements.

Second, the ILECs argue that interconnection and network element pricing issues are local matters which are within the exclusion discretion of state commissions.<sup>71</sup> This argument ignores the fact that both interconnection arrangements and unbundled network elements will be employed to originate and terminate *interstate* as well as intrastate traffic. Thus, the FCC has a legitimate jurisdictional claim over pricing matters. Even more importantly, Congress specifically assigned the FCC a central role in establishing the terms and conditions for both interconnection and unbundling by ILECs pursuant to Section 251. Section 251(d) obligates the Commission to "establish regulations to implement the requirements of [Section 251]"<sup>72</sup> within six months of enactment. Included in the statutory requirements which the FCC must implement is the duty of ILECs to provide interconnection and unbundled network elements "on rates, terms and conditions that are just, reasonable and nondiscriminatory" *and* which are in accordance with the pricing requirements enunciated in Section 252.<sup>73</sup>

The Congressional scheme to have the FCC establish national pricing rules to be implemented through voluntary negotiations and state arbitrations makes good sense. It

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<sup>70</sup> 47 U.S.C. § 252(d)(1)(A)(i).

<sup>71</sup> *See, e.g.*, GTE, pp. 2-7; SBC, pp. 21-23.

<sup>72</sup> 47 U.S.C. § 251(d).

<sup>73</sup> 47 U.S.C. § 251(c)(2)(D) [and] 47 U.S.C. § 251(c)(3).

offers predictability to participants on what is likely to be the most important term of their contractual relationship, and it promotes the national uniformity required for interconnectors to plan their network development. As AT&T makes clear, "[u]ncoordinated price arbitrations in each of the 50 states -- hindered by the same ILEC efforts to thwart competition that led Congress to impose federal standards -- would yield a patchwork of differing and unpredictable pricing outcomes that would render effective voluntary solutions all but impossible."<sup>74</sup>

Of course, it is not enough that the FCC establish national pricing guidelines. It is critical that such rules implement a model which lays a foundation which can support the emergence of a robustly competitive local market. ACSI is pleased that most commenters agreed with its position that prices for interconnection and unbundled network elements be set at TSLRIC. The list of advocates of TSLRIC is impressive, including DOJ, AT&T, MCI, Sprint, CompTel, ALTS, and many others.<sup>75</sup> As AT&T notes, "TSLRIC is compatible with both the 1996 Act and the Commission's own congruent goal of pricing policies that replicate market-based incentives and prices and thereby ensure the availability to consumers of goods and services at lower overall cost and an efficient level of innovation . . . as well as the efficient entry of new firms."<sup>76</sup> Similarly, DOJ stated that "[p]ricing based on TSLRIC is best suited to ensure efficient and effective entry, efficient production of

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<sup>74</sup> AT&T, pp. 45-46.

<sup>75</sup> Other commenters that support a TSLRIC approach include Intermedia, Comcast, NCTA, MCI, CompTel, ACTA, TRA, Cable & Wireless, WorldCom, LCI, ALTS and NCTA.

<sup>76</sup> AT&T, p. 49.

end services, competitive pricing to end users, and the avoidance of anticompetitive behavior by ILECs to preserve their market power."<sup>77</sup>

Some of the generally recognized benefits from a TSLRIC pricing formula include:

- TSLRIC simulates the prices for network elements that would result if there were a competitive market for the provision of such elements to other carriers;
- TSLRIC includes the incremental cost of providing interconnection and unbundled network elements, along with certain direct and allocable costs and a return on investment;
- TSLRIC creates appropriate investment incentives for competitive facilities-based entry and does not distort the entrant's "make or buy" decision;
- TSLRIC creates incentives for developing competition for all network elements;
- TSLRIC leads to lower prices for consumers; and
- TSLRIC minimizes the opportunities for ILECs to engage in anticompetitive behavior (*i.e.*, no anticompetitive cross subsidization and no "price squeezes").

Once again, it is the ILECs which stand in principal opposition to this emerging consensus.<sup>78</sup> Although they make the point many ways, they all seek the right to charge prices which are designed to recover their total costs, including embedded costs and non-allocable shared and common costs.<sup>79</sup> Suffice it to say that the ILECs cannot have it both ways. They cannot at the same time strive to be aggressive market competitors -- as they claim they intend to be -- and require their competition to bail out their bad investment decisions and pay their bloated overhead costs. As importantly, they cannot be permitted to

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<sup>77</sup> DOJ, p. 26.

<sup>78</sup> *E.g.*, Bell Atlantic, pp. 35-39; GTE, pp. 61-62; Ameritech, pp. 63-71.

<sup>79</sup> *Id.*



use overpricing of essential bottleneck facilities to glean an artificial and inherent cost advantage over their local service competitors.

As economists Baumol, Ordover and Willig explain in an Affidavit included with AT&T's submission, "where, as here, markets are ineffectively competitive. . . regulators should set prices that replicate, as closely as possible, the prices that would prevail in the competitive market."<sup>80</sup> They correctly conclude that only use of a TSLRIC costing methodology is consistent with this objective. As they point out, use of TSLRIC pricing promotes "efficiency and the competitive model."<sup>81</sup> By contrast, use of book accounting costs (as the ILECs urge) "creates new ILEC opportunities for inefficiency"<sup>82</sup> and "gives ILECs new opportunities for engaging in anticompetitive behavior by misallocating and mischaracterizing costs."<sup>83</sup>

The Commission should end this debate now and adopt a national rule requiring ILECs to set their prices for interconnection and unbundled network elements at TSLRIC. ACSI recommends that the Commission utilize Subpart E of the proposed draft ALTS regulations as a baseline for creating such rules.

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<sup>80</sup> Affidavit of William J. Baumal, Janusz A. Ordover, and Robert D. Willing, ¶ 5, attached to AT&T Comments.

<sup>81</sup> *Id.* ¶ 17.

<sup>82</sup> *Id.* ¶ 8.

<sup>83</sup> *Id.* ¶ 9.